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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

PURPLE COMMUNICATIONS, INC. and COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO	Case Nos. 21-CA-095151 21-RC-091531 21-RC-091584 **BRIEF OF EMPLOYER AND RESPONDENT PURPLE COMMUNICATIONS, INC.**

The Employer and Respondent, Purple Communications, Inc. ("Purple"), files this brief pursuant to the Administrative Law Judge's invitation to do so in his Order dated February 10, 2015.

Purple submits that the Board's decision in *Purple Communications, Inc.*, 361 NLRB No. 126 (2014) was wrongly decided and files this brief for the purpose of preserving all defenses, including those presented in Purple's previously filed briefs in this case as well as all *amicus* briefs previously filed in support of Purple.

Purple Has The Right To Ensure That Its Email System Is Used Solely For Business Purposes.

Purple's rule governing employees' use of its email system does not violate the Act. Purple respectfully submits that the Board erred in reversing *Register Guard* in this particular case. The Board's decision to reverse *Register Guard* runs contrary to decades of Board decisions recognizing that employers generally have no obligation to permit employees to use employer-owned property, equipment, or materials for Section 7 purposes, provided such restrictions on employee usage are not discriminatory. *See, e.g., Mid-Mountain Foods*, 332 NLRB 229, 230 (2000); *Eaton Technologies*, 322 NLRB 848, 853 (1997); *Champion International Corp.*, 303 NLRB 102, 109 (1991); *Churchill's Supermarkets*, 285 NLRB 138, 155 (1987); *Union Carbide Corp.*, 259 NLRB 974, 980 (1981). In its decision in this matter, the Board expressly stated that it rejected the application of such precedent in this case and "questioned its validity elsewhere." It was improper for the Board to cavalierly sweep aside such longstanding precedent in a manner contrary to the Act in its mistaken reliance on *Republic Aviation*, 324 U.S. 793 (1945). Until now, *Republic Aviation* has never been applied in a manner that compels an employer to make its own resources, equipment, and materials available to its employees so that they can engage in Section 7 activity.

Beyond that, the Board impermissibly afforded special protection to employer-provided email that it does not provide to other types of employer-owned property.[1] There is no basis for doing so. Email is neither the "natural gathering place" at work nor the "present day water cooler" as employees have several other options available to them in which they can communicate and engage in Section 7-protected activity. While email is widely used as a form of communication, it is merely one of several forms of

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[1] In addition, the Board improperly concluded that personal property is entitled to less legal protection than real property. This is a novel conclusion that is not supported by decades of Board precedent. *See, e.g., Johnson Technology, Inc.*, 345 NLRB 762, 763 fn. 8 (2005). Real property and personal property are entitled to the same degree of protection. The Board's conclusion otherwise is unfounded.

communications that employee engage in. Employees at Purple and elsewhere have several other channels in which they can communicate, including social media, instant messaging, and text messaging. The vast majority of Purple employees carry their own cellular phones or smartphones.

The Board failed to provide adequate consideration to the consequences of its ruling. In light of its decision, Purple may now be forced to provide third parties access to Purple email for purposes of Section 7 activity. Moreover, Purple will incur substantial new costs (*e.g.*, data storage, maintenance costs, and the costs of retrieval) due to the Company being required to allow employees to use email systems for Section 7 purposes. Moreover, the inevitable increase in employee email usage that will arise out of this decision, which limits the extent to which employers can regulate the use of email for non-work purposes, will increase the likelihood of its email system jamming or becoming vulnerable to external threats, such as computer viruses.

Furthermore, the decision does not adequately consider the impact of the decision on Purple's ability to monitor employee productivity on the email system, without at least creating the appearance of unlawful surveillance.[2] Under the Board's new standard, it will be essentially impossible for Purple to determine whether its employees are drafting non-work related emails during work time. Moreover, the ruling exposes Purple to additional risks because requiring the Company to allow its employees to use Purple email systems for non-work purposes limits the extent to which Purple can control the use of non-work-related email (which can include email that could impose legal liability on Purple, such as emails that are deemed threatening or harassing). Accordingly, this issue needs to be further revisited.

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[2] While the Board addresses the issue of surveillance, the Board's analysis ignores several practical realities.

The Board's Ruling Violates Section 8(c) Of The Act And Possibly The First Amendment.

The Board failed to provide sufficient consideration to the fact that its reversal of *Register Guard* violates Section 8(c) of the Act and perhaps the First Amendment. The decision forces Purple and other employers to permit employees to communicate non-business related and unapproved messages on their email systems. The fact that these messages would be delivered via the Purple's email system necessarily would create the appearance that the Company endorses the message being disseminated by its employees. The Board's comparison of an email sent through employer-provided email to email sent through a Gmail account is off-base. While one would not reasonably deem an email on Gmail from a non-Google employee to constitute a message sent by the email sender on behalf of Google, it is much more reasonable to assume that an email from a Purple employee sent through a Purple email address represents the views of Purple.

The Board failed to consider these factors. Its decision violates Section 8(c) and arguably the First Amendment because the ruling imposes compelled speech on Purple and other employers. *See National Association of Manufacturers v. NLRB*, 717 F. 3d 947, 956 (D.C. Cir. 2013); *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Virginia State Bd. Of Ed. v. Barnette*, 319 U.S. 624 (1943); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574-75 (1995); *Consol. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 544 (1980).

The Board Did Not Resolve The Issue Of Whether Email Constitutes Solicitation Or Distribution.

Because the Board reversed *Register Guard*, it was essential that the Board answer the critical question as to whether email communication constitutes solicitation or distribution. The Board expressly declined to do so, which is problematic. The Board needed to make this determination so that Purple and other employers have clearer guidance with respect to the extent to which they can regulate the use of their email

systems.

Purple respectfully submits that email should be deemed as distribution rather than solicitation. Emails are themselves written and permanent. As is the case with other written materials, emails occupy space on employer property. The accrual of emails and frequent usage of email over time can take up significant memory on an employer's computer system. As noted above, regular and repeated usage of email, including non-work related emails, risks congesting Purple's email server and interfering with employee productivity during working time. For these reasons, the Board should have deemed email to constitute solicitation and applied longstanding Board precedent regarding permissible employer regulation of distribution.

Retroactive Application Of The Remedy Is Improper.

The Board's retroactive remedy in this case is improper. In doing so, the Board wrongly concluded that there was no "suggestion" that Purple "when it chose to grant access to its email system to the employees involved here, actually relied on the fact that it could lawfully prohibit their use of the system for Section 7 purposes of nonworking time as part of a complete ban on nonwork use." Purple drafted its policies in reliance on the legal authority that existed at the time, including the existing NLRB precedent. As explained above, longstanding Board precedent predating *Register Guard* permitted Purple to restrict its employees from using Purple-owned property, equipment, or materials for purposes of Section 7 communications, provided its restrictions were not discriminatory facially or in practice. Purple relied on these decades of precedent when crafting its policies. It is unfair to punish Purple based on its reliance on Board precedent.

The Board also stated that retroactive application of its ruling was appropriate because the presumption it created in this case is "rebuttable." However, the Board presented no guidance whatsoever on what sort of circumstances or evidence an

employer may rely upon to meet its burden to rebut the presumption. In the absence of such guidance, the notion of a "rebuttable presumption" in this instance appears illusory. Thus, retroactive application is improper in this instance.

CONCLUSION

For all of these reasons, the Board wrongly decided this case and the Administrative Law Judge should not follow its decision.

Dated: March 10, 2015

Respecfully submitted,

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PROOF OF SERVICE
PURPLE COMMUNICATIONS, INC. v.
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO
Case No. 21-CA-095151; 21-RC-091531; and 21-RC-091584

I am employed in the County of Orange, State of California. I am over the age of 18 and am not a party to the within action. My business address is 620 Newport Center Drive, Suite 200, Newport Beach, California 92660. On **March 10, 2015,** I served the foregoing document described as follows:

BRIEF OF EMPLOYER AND RESPONDENT PURPLE COMMUNICATIONS, INC.

☐ **By United States Mail:** I am readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Newport Beach, California, in the ordinary course of business. I enclosed the above-referenced document(s) in a sealed envelope or package addressed to the person(s) at the address(es) as set forth below, and following ordinary business practices above I placed the package for collection and mailing the date and at the place of business set forth below.

☒ ****By Overnight Delivery**: I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the person(s) at the address(es) listed below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier. **Honorable Paul Bogas, Administrative Law Judge (Only)**

☐ **By Fax Transmission**: I caused to be transmitted the document described herein via the fax number listed below. Upon completion of said facsimile transmission, the transmitting machine issued a transmission report showing the transmission was complete and without error.

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☐ ***(STATE)*** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☒ ***(FEDERAL)*** I declare under the laws of the United States of America that I am employed in the office of a member of the Bar of this court at whose direction the service was made and that the foregoing is true and correct.

Executed on March 10, 2015, at Newport Beach, California.

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